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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

COMMITTEE ON JOBS CANDIDATE ADVOCACY FUND and BUILDING OWNERS AND MANAGERS ASSOCIATION OF SAN FRANCISCO INDEPENDENT EXPENDITURE POLITICAL ACTION COMMITTEE, political action committees organized under the laws of California and of the City and County of San Francisco,

Plaintiffs,

vs.

DENNIS J. HERRERA, in his official capacity as City Attorney of the City and County of San Francisco, KAMALA D. HARRIS, in her official capacity as District Attorney of the City and County of San Francisco, the SAN FRANCISCO ETHICS COMMISSION of the City and County of San Francisco, and CITY AND COUNTY OF SAN FRANCISCO,

Defendants.

No. C-07-3199 JSW

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Date: September 17, 2007
Time: 1:30 p.m.
Judge: Hon. Jeffrey S. White
Courtroom: 2

Filed herewith:

1. Supplemental Declaration of Nathan Nayman
2. Plaintiffs' Objections to Defendants' Evidence

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I. INTRODUCTION.

The City's principal legal arguments rest on cases about contributions to political parties, not independent expenditures. The City's principal factual arguments rest on newspaper clippings and conjecture. Neither provide a constitutionally valid basis for limiting free speech. This Court should reject these erroneous arguments and instead follow the lead of the Ninth Circuit and three other judges in this District.

II. ARGUMENT.

A. Limits on Contributions to Independent Expenditure Committees Are Subject to Strict Scrutiny.

The Ninth Circuit and two judges in this District have held that limits on contributions to independent expenditure ("IE") committees such as Plaintiffs trigger strict scrutiny—the most exacting form of judicial review required by the Constitution. *See* Motion for Preliminary Injunction (Dkt. 11) ("Motion") at 10-14. The City attempts to evade strict scrutiny by retreating to inapposite cases where contributions to and expenditures by IE committees were simply not at issue.

1. The Cases Cited by the City for a Lesser Standard of Review Did Not Involve Limits on Independent Expenditure Committees.

The City principally relies on *McConnell v. FEC*, 540 U.S. 93 (2003). It is not a case about IE committees. Instead, it is about something very different—the use of "soft money" by political parties. The Bipartisan Campaign Reform Act of 2002 ("BCRA") limits flows of "soft money" in and out of political parties. "Soft money" is money not used in direct support of candidates for federal office, but rather to fund state candidates, voter registration drives, get-out-the vote efforts and other "electioneering" activities. *See* 540 U.S. at 122-23, 142-61. The Court applied a lower standard of review ("closely drawn scrutiny") to limits on "soft money," asking whether they were "closely drawn to match a sufficiently important interest." *Id.* at 136 (internal quotations omitted). It applied the lower standard because political parties typically work hand-in-hand with candidates and had used this close relationship to undermine direct "hard money" limits and peddle access,

creating the appearance of corruption. *Id.* at 151-52; *see generally id.* at 146-64.[1]

McConnell's holding does not apply to IE committees. IE committees do not work hand-in-hand with candidates, do not peddle access and do not facilitate corruption. By law, independent expenditure committees must be "independent" and cannot coordinate expenditures with candidates. *See* Cal. Gov't Code § 82031. Otherwise, their expenditures are deemed campaign contributions and subject to any applicable limits.

The City says *McConnell* "construed the government's interest broadly enough to justify regulation beyond 'contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with' candidates." Mem. Pts. & Auths. in Opp. to Mot. for Prelim. Inj. (Dkt. 19) ("Opp."), at 12 (quoting *McConnell*, 540 U.S. at 152). That's wrong. The City tellingly omits half of the first sentence it quotes—cutting words showing that the Court was talking about political parties, not IE committees:

> *Despite this evidence and the close ties that candidates and officeholders have with their parties, Justice KENNEDY would limit Congress' regulatory interest only to the prevention of the actual or apparent quid pro quo corruption 'inherent in'* contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with, a federal officeholder or candidate.

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[1] The Court devoted pages to describing this close relationship. For example:

> The record in the present case is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations. So pervasive is this practice that the six national party committees actually furnish their own menus of opportunities for access to would-be soft-money donors, with increased prices reflecting an increased level of access. For example, the DCCC offers a range of donor options, starting with the $10,000- per-year Business Forum program, and going up to the $100,000-per-year National Finance Board program. The latter entitles the donor to bimonthly conference calls with the Democratic House leadership and chair of the DCCC, complimentary invitations to all DCCC fundraising events, two private dinners with the Democratic House leadership and ranking members, and two retreats with the Democratic House leader and DCCC chair in Telluride, Colorado, and Hyannisport, Massachusetts. Similarly, "the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors."

540 U.S. at 151-52 (citations omitted); *see generally id.* at 146-64.

McConnell, 540 U.S. at 152 (italics mark the words the City omits). Because IE committees do not present the same risk of corruption that political parties do, the lesser scrutiny that the Court employed in *McConnell* is inappropriate here.[2]

The City also misconstrues the plurality opinion in *California Medical Association v. FEC*, 453 U.S. 182 (1981) ("*CMA*"). Like *McConnell*, *CMA* did not address IE committees. Rather, *CMA* upheld limits on contributions to multi-candidate PACs that received contributions from at least 50 sources and contributed directly to at least five candidates for federal office. *Id.* at 184-85 & n.1, 195-99. The swing vote, Justice Blackmun, wrote separately to clarify that the limits being upheld did not apply to contributions to IE committees and that "a different result would follow" if they had. *Id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment).

The City erroneously argues that contributions to IE committees constitute "'speech by proxy,' which is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.'" Opp. at 7 (quoting *CMA*, 453 U.S. at 195-96). The argument is wrong because the Supreme Court applies the "speech by proxy" rationale to contributions to candidates, not contributions to IE committees. As held in *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), the expression conveyed by a candidate contribution "rests solely on the undifferentiated, symbolic act of contributing." The distinction between contributions to IE PACs and contributions to candidates or parties is the difference between citizens banding together to fund directly the expression of *their own* views, and merely facilitating a candidate's expression of *the candidates'* views. As the Supreme Court put it in *FEC v. Nat'l Conservative PAC* ("*NCPAC*"), 470 U.S. 480, 495

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[2] The *McConnell* Court offered an additional reason for not applying strict scrutiny to the soft-money restrictions in BCRA: "*Buckley*'s 'closely drawn' scrutiny . . . shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." 540 U.S. at 137. With all due respect to the residents of San Francisco, the voters who passed Prop. O (of which Section 1.114(c) was a small part) cannot be said to have the "particular expertise" in campaign finance law that the United States Congress has. *See id.*; *see also id.* at 115-33 (describing a century's worth of federal campaign finance legislation).

(1985), "the 'proxy speech' approach is not useful in this case [because] the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money."[3]

2. Cases Actually Dealing with Limits on Independent Expenditure Committees Apply Strict Scrutiny.

Courts apply strict scrutiny to limits on contributions to IE committees, especially when the limits dramatically curb committees' expenditures. Motion at 10-14. Two judges from this District (Judges Ware and Jenkins) recently applied strict scrutiny in enjoining limits substantially similar to those at issue here, a fact that the City effectively concedes. *See San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose*, No. C 06-04252-JW, 2006 WL 3832794 (N.D. Cal. Sept. 20, 2006) ("*COMPAC*"), Request for Judicial Notice (Dkt. 14) ("RFJN") Ex. G; *OakPAC v. City of Oakland*, No. 06-CV-06366-MJJ (N.D. Cal. Oct. 19, 2006), RFJN Ex. E. A third (Judge Wilken) struck down the predecessor to the limits at issue here, although she did not specify the standard of review she was applying in doing so. *San Franciscans for Sensible Government v. Renne*, No. C-99-02456-CW (N.D. Cal. 1999), RFJN Ex. H. The City says little about these decisions, other than that they are "unpublished" or not final. *See* Opp. at 10-11.

The City attempts to minimize the significance of *Lincoln Club v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002). *See* Opp. at 9-10. In so doing, the City glosses over the fact that Judges Ware and Jenkins both relied on *Lincoln Club* in applying strict scrutiny to the limits at issue in the *COMPAC* and *OakPAC* cases. They did so despite the fact that the plaintiffs could not show that San Jose's or Oakland's ordinances barred them from making

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[3] The City's reliance on *FEC v. Beaumont*, 539 U.S. 146, 149 (2003) also is misplaced. While *Beaumont* holds that the federal ban on corporate contributions extended to nonprofit corporations, the holding does not apply to political action committees or to independent expenditures. Indeed, the Court said that a nonprofit was free to establish a separate segregated fund PAC to be used for political purposes. *Id.* at 149. It also affirmed that *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), which barred limits on independent expenditures by nonprofits, remains good law. *Beaumont*, 539 U.S. at 191.

any IEs, as the plaintiffs in *Lincoln Club* had established. *See COMPAC*, 2006 WL 3832794, at *6, RFJN Ex. G; *OakPAC*, RFJN Ex. E, at 3. Indeed, Judge Ware concluded that "[i]t is indisputable that there has been no showing of hardship to COMPAC comparable in magnitude to that suffered in *Lincoln* Club," and that "[r]ather than facing a complete bar on expenditures, COMPAC faces restrictions on expenditures." *COMPAC*, 2006 WL 3832794, at *6, RFJN Ex. G. Nonetheless, Judge Ware held that "the appropriate level of constitutional review is strict scrutiny." *Id.*

The City insists that while Section 1.114(c) may restrict the expenditures Plaintiffs can make, Plaintiffs can, like the political parties in *McConnell*, "'solicit from a wider array of potential donors.'" Opp. at 8 (quoting *McConnell*, 540 U.S. at 140). Therefore, says the City, Section 1.114(c) does not prevent Plaintiffs from making IEs in the way that the ordinance in *Lincoln Club* did. *Id.* The City forgets that Plaintiffs are not at all like political parties. Political parties are open to everyone and will take money from anyone. In contrast, Plaintiffs have a very specific focus and membership criteria, and solicit money only from their members. Nayman Decl. (Dkt. 13) ¶¶ 2, 5, 19-20; Intermaggio Decl. (Dkt. 12) ¶¶ 2, 5, 8.

If Plaintiffs were forced to admit more members or solicit contributions from non-members, their basic nature would change. This is particularly true of the JOBS Fund. JOBS has always had less than 50 members—its bylaws prevent it from taking on more. Nayman Supplemental Declaration (filed herewith) ¶ 5. The JOBS Fund only accepts contributions from JOBS's members. *Id.* ¶ 6. JOBS has no intention of changing these aspects of its or its PAC's organizational structure. *Id.* ¶ 7.

In light of these facts, forcing Plaintiffs to change their fundraising practices as the City urges would violate their right to freedom of association. As with the Lincoln Club, Section 1.114(c) is "a double-edged sword, placing a substantial burden on protected speech (i.e., barring expenditures) while simultaneously threatening to burden associational freedoms (i.e., by requiring a restructuring of [Plaintiffs])." *Lincoln Club*, 292 F.3d at 939. Accordingly, Section 1.114(c) should receive strict scrutiny. *Id.*

B. Section 1.114(c) is Not Closely Drawn to Match a Sufficiently Important Interest Or Narrowly Drawn to Serve a Compelling Government Interest.

The City does not even attempt to argue that Section 1.114(c) could survive strict scrutiny. It cannot. The City also cannot show that Section 1.114(c) could survive "closely drawn" scrutiny. The City's evidence does not meet the threshold required; instead, it shows that Section 1.114(c) targets free speech and association, not corruption.

1. The City has a heavy evidentiary burden to justify Section 1.114(c).

Even under less rigorous scrutiny, the City must prove that Section 1.114(c) is closely drawn to match a sufficiently important government interest. *See Randall v. Sorrell*, 126 S. Ct. 2479, 2994-2500 (2006); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 386 (2000) (citing *Buckley*, 424 U.S. at 25). This requires evidence, not press clippings and conjecture: "We have never accepted mere conjecture as adequate to carry a First Amendment burden." *Shrink*, 528 U.S. at 392; *see also Randall*, 126 S. Ct. at 2499 ("The record contains no indication that, for example, corruption (or its appearance) in Vermont is significantly more serious a matter than elsewhere.").

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink*, 528 U.S. at 391. Here, the City argues a novel and implausible theory: that an IE committee's receipt of more than $500 from any of its members, to be used to express their views on candidates for office, would corrupt or appear to corrupt such candidates, even though the committee is barred from coordinating its speech with them. The City's evidence (*see* Dkts. 21-23) falls short of the quantum needed to justify a theory the Supreme Court has rejected. *See Buckley*, 424 U.S. at 45-48.

2. The City's "evidence" does not establish that Section 1.114(c) matches a sufficiently important interest.

The City attempts to argue that its IE limitations were a measured response to corruption. This is, to put it mildly, revisionist history.

The 13 meetings of the Ethics Commission (St. Croix Decl. (Dkt. 21) Exs. A-M)

focused only briefly, and belatedly, on IE limitations—and then the rationale offered was not one allowed by the Supreme Court. For the most part, the Ethics Commission focused on (1) public financing of campaigns and (2) improved disclosures, neither of which this lawsuit challenges. When the Commission discussed IEs, it was largely in this context.

Thanks to Judge Wilken's ruling, the 1999 mayoralty race did see large IEs, almost all of which favored the incumbent, Mayor Willie Brown, over the challenger, Board President Tom Ammiano. Dkt. 21-11, at 12-28. But lots of speech cannot glibly be equated with lots of corruption, nor (as the City would suggest) were all the speakers business people currying favor. The testimony of the Ethics Commission's Executive Director does not even suggest that this independent speech amounted to corruption. *Id.* at 12-28. Indeed, her testimony shows that six of the seven largest IE PAC expenditures were made by labor union or Democratic Party committees (the State Central Committee, the County Central Committee and the Alice B. Toklas Lesbian and Gay Democratic Club). *Id.* at 15 (the seventh was a business group). The broad range of IEs reflect the fact that a lot of people across the ideological spectrum favored Mayor Brown and feared a Mayor Ammiano. So too the voters, who re-elected Mayor Brown by a margin of 131,983 to 89,428. *See* http://www.sfgov.org/site/elections_page.asp?id=61447.

Before the 1999 election and after, the Ethics Commission—at the request of Board President Ammiano and subsequently the full Board of Supervisors—set out to create a system of public financing for elections (which in the main is what Proposition O accomplished). Dkt. 21-3, at 6. To the extent the Ethics Commission discussed IEs at all, it was almost always in the context of how IEs might affect public financing. Most of the discussion was about whether a candidate who agreed to spending limits as the price of public financing ought to have that limit lifted if IEs exceeded a certain level. *E.g.*, Dkt. 21-3, at 6, 19, 31; Dkt. 21-4, at 3, 8, 10, 11; Dkt. 21-5, at 11; Dkt. 21-12, at 29. Some discussion focused on a "gap" in the disclosure rules then applicable to IE committees. Dkt. 21-4, at 12; 21-6, at 5-6; 21-7, at 11; 21-9, at 10, 16; 21-10, at 15; 21-12, at 23, 28, 33. At the time, state law required such committees to file reports in even-numbered years—

whereas San Francisco held mayoral elections in odd-numbered years. *E.g.*, Dkt. 21-6, at 5-6. The Ethics Commission explored and ultimately adopted a regime of much more robust disclosure, with disclosure of major spending required within 24 hours. *E.g.*, Dkt. 21-4, at 12; 21-9, at 10, 16; 21-10, at 15; 21-12, at 23.

Until May 15, 2000, the Ethics Commission mainly discussed IEs in this context. Occasionally, however, a speaker would express a desire to limit IEs for constitutionally impermissible reasons such as limiting their effectiveness or creating a level playing field. *E.g.*, Dkt. 21-7, at 8-10.[4] The response of one "expert witness" (Robert Stern) was enlightening:

> Commissioners Melbostad and Dockendorff expressed their concern over the impact of independent expenditures on campaigns. They asked Mr. Stern how independent expenditures might be limited. Mr. Stern stated that the courts have thus far prevented municipalities from limiting independent expenditures. He stated that disclosure is the best way to reduce their impact on campaigns, since the public would then know who is financing the independent spending. Mr. Stern suggested that another way to reduce the impact of independent spending is to provide greater public financing to candidates who do not receive independent expenditures. Commissioner Norris asked Mr. Stern if there was any way to anticipate and prepare for last minute spending by independent expenditure committees. Mr. Stern indicated that there is no accurate way to do this. He stated that an effective remedy for independent spending could only be achieved through an amendment to the U.S. Constitution.

Dkt. 21-7, at 8.

Meanwhile, Board President Ammiano, no doubt smarting from his defeat, asked for an investigation into campaign and IE fund-raising in connection with the 1999 mayoralty election. Dkt. 21-10, at 10-11. In particular, he asked the Ethics Commission staff to look for evidence of corruption. *Id.*[5] The Executive Director reported back to the

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[4] *Buckley* makes clear that such goals are unconstitutional: "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." 424 U.S. at 48-49 (internal quotations omitted).

[5] The Ethics Commission discussed expanding its audits to see whether expenditures (continued…)

Board of Supervisors; as noted, her testimony contains no suggestion of any corruption. Dkt. 21-11, at 12-28. The same is true of the Executive Director's "remarks" to the Board's Finance Committee. In response to a statement by Supervisor Yee attacking "the level of independent spending," the Director said: "IT IS IMPORTANT TO NOTE THAT THE COURTS HAVE THUS FAR INVALIDATED THE EFFORTS OF MUNICIPALITIES TO LIMIT INDEPENDENT EXPENDITURES. IT IS THE COMMISSION'S POSITION THAT GIVEN THESE CONSTRAINTS, PUBLIC DISCLOSURE IS THE BEST WAY TO REDUCE THE IMPACT OF INDEPENDENT EXPENDITURES ON CAMPAIGNS." Dkt. 21-12, at 28 (emphasis in original).

There things stood until a month before the Ethics Commission finished work on its public financing proposal, which became Prop. O. Then, at the meeting of May 15, 2000, "expert witness" Robert Stern suggested a way to work around Judge Wilken's injunction:

> Mr. Stern asked the Commission to consider adding a section to the proposal that would limit contributions made to independent expenditure committees. He stated that although the district court found unconstitutional a similar provision in the Campaign Finance Reform Ordinance, the City could now defend the provision, given the influence of independent expenditures in the last mayoral election.

Dkt. 21-13, at 7. Apparently Mr. Stern favors free speech only if it has no influence on voters. The "Coordinator" of San Francisco Common Cause, Charles Marsteller (who has filed a declaration in support of the City, Dkt. 22), also spoke in favor of Mr. Stern's idea. Dkt. 21-13, at 8.

At the next meeting (June 12, 2000), Mr. Stern again spoke in favor of limiting IEs. This time, apparently repenting his previous rationale for IE limits, he offered a different justification:

> Mr. Stern stated that the rationale for limiting contributions to committees is that a committee could theoretically launder money to a candidate. He said

(…continued)
made by IE committees "are in fact independent" (as opposed to whether donors were being shunted to IEs by campaigns). Dkt. 21-12, at 8-10. There is no evidence in the record that the Commission expanded its audits. In any event, there is no suggestion that anyone funneled a nickel to Plaintiffs, who take contributions only from their members.

> that courts have upheld this rationale as a lawful restriction on contributions to PACs. Thus, San Francisco would be justified in lowering contributions to committees to $500, he said.

Dkt. 21-14, at 6. Despite the absence of any evidence that any San Francisco IE PAC has ever 'laundered' money to a candidate ("theoretically" or otherwise), this rationale apparently carried the day.[6] At the same meeting, the Commission approved adding IE limits to the proposed legislation. *Id.* at 9. The IE limitation, crammed in with a raft of popular initiatives such as public financing and increased disclosures, passed at the next general election; Prop. O received 53.4% of the vote. Dkt. 21-16, at 8.

This, then, is what a fair reading of the administrative record shows: a last-minute suggestion, supported by a series of constitutionally-invalid rationales designed to avoid a court order, leading to the adoption of an ordinance designed to limit independent speech.

Eager to avoid a record devoid of any constitutionally valid rationale for Section 1.114(c), the City offers instead a series of newspaper clippings (Dkt. 20 Exs. A-O) and the recollections of the San Francisco Coordinator of Common Cause about telephone conversations he had in 1999 and 2000 (Dkt. 22 ¶¶ 6-10). With all due respect, attempts to limit First Amendment freedoms, if they are to have any constitutional validity, must rest on some firmer foundation than articles in the *Bay Guardian*[7] and one man's perception

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[6] This rationale makes no sense; IE committees simply cannot "launder" money. The concept of "laundering money" refers to a situation when a person makes a contribution to an intermediary, and the intermediary uses those funds to make contributions to a candidate without disclosing the true source of the funds. The public then does not know who actually made the contribution. Laundering is a device used primarily to get around contribution limits. *See* Cal. Gov't Code § 84301 (prohibiting contributions "by any person in the name of a person other than the name by which such person is identified for legal purposes"); *id.* § 84302 (prohibiting contributions by intermediaries or agents without disclosure). This rationale has no application to contributions made to a committee that will then use the money for independent expenditures.

[7] The City relies extensively on newspaper articles to insinuate that contractors who gave money to IE committees who supported Mayor Brown corruptly received favorable treatment from Mayor Brown's administration. *See* Opp. at 1-3. These bold and sensational charges are not supported by competent evidence, let alone indictments or convictions. The City's chain of inferences is missing too many links. The projects and contracts referred to in the articles were not awarded by the Mayor but by various City commissions and boards, only some of whose members were appointed by the Mayor. Many of the articles talk not about IE contributions but about campaign contributions— (continued…)

about the consensus views of people who telephoned Common Cause seven years ago to vent. This kind of group-think has no place in First Amendment jurisprudence.

The City's declarations and exhibits tell us nothing about why the voters approved Prop. O, much less whether the IE limits were even a factor. In contrast, the cases cited by the City relied on better evidence. In *Shrink*, 528 U.S. at 393-94, the evidence included the criminal conviction of Missouri's former Attorney General on corruption charges and an affidavit from the chair of Missouri's Interim Joint Committee on Campaign Finance Reform, who stated that large candidate contributions—not IE contributions—have "'the real potential to buy votes.'" In *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), the evidence included "testimony of a 30-year veteran of the Montana legislature who stated that special interests funnel more money into campaigns when particular issues approach a vote 'because it gets results'" and a contemporaneous letter from a state senator to his colleagues urging them to vote for a certain bill to ensure that contributions from a particular PAC would continue to flow to his party. *Id.* at 1093.

The City cites *Shrink* for the proposition that newspaper articles can prove that legislation is supported by a sufficiently important government interest. Opp. at 11. But *Shrink* involved restrictions that were neither novel nor implausible; indeed, the limits in that case were imposed on contributions to *candidates*. *See Shrink*, 528 U.S. at 394-96. *Shrink* also instructs courts to disregard evidence unless it can be shown to have influenced the voter's thinking. *Shrink*, 528 U.S. at 395 (stating that "absence of any reason to think that public perception has been influenced by the studies cited" calls into question their value as evidence). The City makes no such showing. And the fact that the Ethics Commission drafted the ordinance does not demonstrate that its current director (who was not Director in 2000) knows the voters' purposes in enacting Prop. O.[8]

(…continued)
quite a different matter. *Buckley*, 424 U.S. at 47; *NCPAC*, 470 U.S. at 498.

[8] The current Executive Director of the Ethics Commission certainly cannot know the voters' intent with respect to IE limits, as he was not even working for the Ethics (continued…)

3. Section 1.114(c) is not closely drawn or narrowly tailored to an anti-corruption purpose.

Even if "less rigorous" scrutiny applies, and even if it could be shown that voters approved IE limits out of concern for corruption, Section 1.114(c) would still be unconstitutionally overbroad. The City's theory—based on newspaper articles—is that City commissions and boards approved contracts or other measures that benefited certain contributors to IE committees. *See* Opp. at 1-3. If that is truly a concern—as opposed to a *post-hoc* rationalization—it cannot justify limiting the free speech of people who do not do business with the City. The proper narrowly-tailored response is that taken by another section of the Campaign and Governmental Conduct Code. Section 1.126 prohibits contributions by City contractors or prospective contractors to candidates who would have to approve such contracts, or whose appointees would have to do so, in the time period surrounding negotiations or award of such a contract. *See* RFJN Ex. C, at 15-16. In comparison to a blanket restriction on IE committees, Section 1.126 *is* closely drawn to match the City's interest in reducing corruption. Restricting the speech of numerous non-contractors reaches far too broadly. *Cf. Day v. Holohan*, 34 F.3d 1356, 1365 (8th Cir. 1994) ("the concern of a political *quid pro quo* for large contributions, which becomes a possibility when the contribution is to an individual candidate . . . is not present when the contribution is given to a political committee or fund that by itself does not have legislative power"). Section 1.114(c) reaches far too broadly.

(…continued)
Commission when Prop. O was passed. *See* St. Croix Decl. ¶ 2 (noting that he became Executive Director in 2004). Even if the City had offered evidence from a Commissioner at that time, "'an after-the-fact declaration of intent by a drafter … [would] … by no means govern our determination how the voters understood the ambiguous provisions.'" *Kennedy Wholesale v. State Bd. of Equalization*, 53 Cal. 3d 245, 250 (1991) (citing *Carman v. Alvord*, 31 Cal. 3d 318, 331 n.10 (1982)).

C. The Loss of First Amendment Freedoms Constitutes Irreparable Injury and the Balance of Hardships Weighs in Favor of Plaintiffs.

1. The First Amendment has no expiration date.

The City contends that Plaintiffs have slept on their First Amendment rights because they did not file this lawsuit shortly after Prop. O was passed. *See* Opp. at 14. The City argues that this passage of time eliminates any claim of irreparable injury. In a First Amendment case such as this, the City's argument falls flat. Notably, the City does not dispute that "the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 372 (1976), as Plaintiffs pointed out in their Motion. *See* Motion at 19. Indeed, when a deprivation of a constitutional right is involved, courts hold that no further showing of irreparable injury is necessary. *See Warsoldier v. Woodford*, 418 F.3d 989, 1001-02 (9th Cir. 2005) (citing 11A Wright, Miller & Kane, Federal Practice and Procedure § 2948.1 (2007)). In contrast, the cases cited by the City did not involve the loss of constitutional rights. *See Citibank v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (trademark); *Oakland Tribune, Inc. v Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) (monopolization); *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984) (plaintiff asserted a First Amendment claim, but Ninth Circuit held that there was no First Amendment violation).[9]

2. Plaintiffs have established First Amendment violations.

Plaintiffs have already demonstrated that "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *See Buckley*,

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[9] As one court has explained the *Lydo* case, "[i]n fact, the Ninth Circuit in *Lydo* seemed inclined to find irreparable harm despite the delay but for its disagreement 'with the [district] court's conclusion that Lydo has made a showing that First Amendment freedoms are in fact violated.'" *Legal Aid Soc'y v. Legal Servs. Corp.*, 961 F. Supp. 1402, 1418 (D. Haw. 1997), *rev'd in part on other grounds*, 145 F.3d 1017 (9th Cir. 1998) (citing *Lydo*, 745 F.2d at 1214).

424 U.S. at 21; Motion at 7-9, 19 (discussing various hardships to Plaintiffs).[10] The City's suggestion that JOBS's members could alleviate these burdens simply by making IEs themselves, Opp. at 14, ignores that Plaintiffs' challenge to Section 1.114(c) includes a freedom of association claim. JOBS and BOMA-SF created Plaintiffs so that their members could band together to amplify their voices, recognizing that there is strength in numbers. *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association."); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 296 (1981) ("To place a Spartan limit-or indeed any limit-on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association.").[11] Plaintiffs should not have to sacrifice their associational rights to alleviate the hardship that Section 1.114(c) imposes.

3. The balance of hardships weigh in favor of Plaintiffs.

In addressing the alternate test for a preliminary injunction, the City does not dispute that questions of law have been raised that are "substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberative investigation." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). Instead, it aims at the other half of the alternate test, contending that the balance of hardships that would flow from an injunction tips in its favor. Opp. at 15. The City argues that an injunction could "promote voter cynicism and disengagement . . . and cast a cloud over the City's system of representative government." *Id.* The City offers no evidence, however,

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[10] *Mont. Right to Life Ass'n v. Eddleman*, 343 F.3d 1085, 1095 (9th Cir. 2003), which the City cites in claiming that Plaintiffs' Declarations are "insufficient" to establish irreparable harm (*see* Opp. at 14), is inapposite. In *Eddleman*, no harm was shown because the plaintiffs' witnesses raised *more* money after contributions were limited. *Id.*

[11] Ironically, if any of JOBS's or BOMA-SF's members followed the City's command, its political advertisements would have to disclose who paid for the ad. *See, e.g.*, CFRO §§ 1.162-1.163, RFJN Ex. C, at 34-38. If anything, this would seem *more* likely to produce "the appearance of corruption," not less, as a candidate could more easily determine and then reward the sponsor of the ad. Individuals stand out; PAC members are part of a group.

for this bald speculation. In contrast, the evidence shows that IE limits have had a considerable impact on the ability of Plaintiffs to engage in political speech. *See* Motion at 7-9, 19; Nayman Decl. ¶¶ 13-23; Intermaggio Decl. ¶¶ 15-22.

The City also contends that "[i]n 'balanc[ing] the hardships of the public interest against a private interest, the public interest should receive greater weight.'" Opp. at 15 (quoting *FTC v. Affordable Media LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999)). *Affordable Media* does not involve constitutional rights at all but instead the FTC's efforts to enjoin a Ponzi scheme pursuant to the Federal Trade Commission Act (15 U.S.C. § 53(b)), which decreases the traditional equitable standards for a preliminary injunction—for the FTC, not the City. *Id.* at 1233. More fundamentally, the City's argument misconceives the issue. Free speech under the First Amendment is merely not a "private interest"; it is a fundamental constitutional right. Particularly in light of the First Amendment rights at stake, the balance of hardships here tilts decidedly toward Plaintiffs.

III. CONCLUSION.

For the foregoing reasons and those stated in the Motion, the Court should grant the Motion, and enjoin Defendants from enforcing Sections 1.114(c) (1) and 1.114(c)(2) of the San Francisco Campaign Finance Reform Ordinance. The Court should also exercise its discretion and waive the bond requirement of Fed. R. Civ. P. 65(c).

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